

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

DAVID WHITEMORE,)	
)	
Petitioner,)	
)	
v.)	Case No. CIV-10-1409-R
)	
DAVID MILLER, Warden,)	
)	
Respondent.)	

ORDER

Before the Court are the Report and Recommendation of United States Magistrate Judge Robert E. Bacharach entered April 7, 2011 [Doc. No. 26] and Petitioner’s Objection to the Report and Recommendation [Doc. No. 39]. The Court reviews the Report and Recommendation *de novo* in light of Petitioner’s Objection.

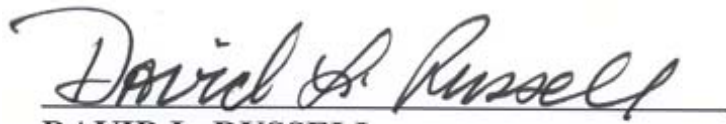
Petitioner again argues that the “continuing tort” doctrine should be applied. The Court, however, agrees with the Magistrate Judge that the doctrine could not apply in the context of 28 U.S.C. § 2244(d)(1)(D) because the ability to discover the factual predicate for a claim could not involve a “continuing” period of time. *See* Report and Recommendation at p. 8.

Petitioner also argues that the one-year statute of limitations should not begin to run until his administrative appeal became final on May 13, 2010, citing Exhibit “2” to Respondent’s Motion to Dismiss and *Dulworth v. Evans*, 442 F.3d 1265 (10th Cir. 2006) and cases cited therein. *Dulworth* holds that the date on which a petitioner discovers the factual predicate of his federal habeas claim through the exercise of due diligence is the date the

decision rejecting his final administrative appeal becomes final, when a petitioner has timely and diligently exhausted his administrative remedies. *See Dulworth*, 442 F.3d at 1268-69. However, the record herein reflects that Petitioner did not timely and diligently exhaust his administrative remedies. *See* Exhibit “2” to Respondent’s Motion to Dismiss [Doc. No. 12]. Accordingly, the *Dulworth* case and the other circuit courts’ decisions cited by Petitioner are of no assistance to him.

Having carefully reviewed *de novo* the Report and Recommendation of the Magistrate Judge, the Court concurs and ADOPTS the Report and Recommendation and GRANTS Respondent’s motion for summary judgment on grounds of timeliness and DENIES Petitioner’s request for an evidentiary hearing.

IT IS SO ORDERED this 12th day of July, 2011.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE